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Dicta, Schmicta: Theory Versus Practice in Lower Court Decision-Making

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ESSAY

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The distinction between dicta and holding is at once central to the American legal system and largely irrelevant. In the first systematic empirical study of lower court invocations of the distinction, we show that lower courts hardly ever refuse to follow a statement from a higher court because it is dicta. Specifically, federal court of appeals meaningfully invoke the distinction in about 1 in 4,000 cases; federal district courts in about 1 in 2,000 cases; and state courts in about 1 in 4,000 cases. In this essay, we report these findings, describe our coding system, and offer a preliminary assessment of the implications of our study. Most notably, our findings cast doubt on the vitality of traditional common law judging. Rather than play a significant role in the development of legal principle by treating extraneous statements in higher court rulings as non-binding dicta, lower courts cede much of their common law power to higher courts. Higher courts can issue sweeping rulings that address questions not immediately before them, knowing that those statements will not be treated as dicta. In highlighting this dynamic between lower and higher courts, our study also casts light on the ongoing debate over judicial minimalism. The ability of courts to pursue the minimalist project of issuing narrow fact-specific rulings is undercut by a regime in which lower courts look to higher courts for the enunciation of legal principles. Finally, our study is highly salient to the practice of law. Lawyers, while frequently referencing the holding-dicta distinction in legal briefs, have little reason to think that a lower court will ever invoke the distinction to rule against higher court dicta.

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One of the spirited debates set off by the Supreme Court's health care decision has nothing to do with the quality of the Justices' legal reasoning or what the policy consequences of the decision should be. Rather, it revolves around the question whether Chief Justices Roberts's opinion should be considered "holding" or "dicta." Because the Affordable Care Act was ultimately upheld under the taxing power, academics, practitioners, and the Justices themselves squared off on what precedential weight, if any, should be given to the Chief Justice's determination that Congress could not compel participation in the health insurance market under its commerce power. For Randy Barnett (who championed the commerce clause argument embraced by Roberts), the opinion was holding because Roberts claimed that he would not have even considered the taxing power argument if the statute were a permissible use of Congress's commerce power. [1] For Jack Balkin (who vigorously defended the statute), however, the Roberts opinion was "dicta;"[2] for Justice Ginsburg it was not "outcome determinative" and therefore unnecessary.[3]

Why this debate? Because dicta and holding are usually thought to be entitled to very different weight in the American legal system (and other common-law systems): "[a] court's holding defines the scope of its power; holdings must be obeyed. . . . [d]icta is the stuff that doesn't need to be obeyed." [4] If Roberts's commerce power determination is a holding, then

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[1]Randy Barnett, Op-Ed., *We Lost on Healthcare. But the Constitution Won*, WASH. POST, (June 29, 2012), http://www.washingtonpost.com/opinions/randy-barnett-we-lost-on-health-care-but-the-constitution-won/2012/06/29/gJQAzJuJCW_story.html. *See also* Ilya Somin, *A Simple Solution to the Holding vs. Dictum Mess*, VOLOKH CONSPIRACY (July 2, 2012, 3:47 PM), http://www.volokh.com/2012/07/02/a-simple-solution-to-the-holding-vs-dictum-mess.

[2]Jack Balkin, *Supreme Court Year in Review Entry 18: That Boring Old Tax Argument was Always a Winner*, SLATE (June 28, 2012, 7:08 PM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2012/_supreme_court_year_in_review/supreme_court_year_in_review_it_was_always_about_the_tax_.html.

[3]Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2629 n.12 (2012) (Ginsburg, J., concurring).

[4] David Post, *Commerce Clause "Holding vs. Dictum Mess" Not So Simple*, VOLOKH CONSPIRACY (July 3, 2012, 8:17 AM), http://www.volokh.com/2012/07/03/commerce-clause-holding-v-dictum-mess-not-so-simple. For a competing perspective, see Somin, *supra* note 1 (suggesting that the court deciding a case has the power to declare what is holding and what is dicta). For other commentary on this issue, see Warren Richey, *Questions About Chief Justice's Health-Care Ruling Could Have Lasting Impact*, CHRISTIAN SCI. MONITOR (July 3, 2012), http://www.csmonitor.com/USA/Justice/2012/0703/Questions-

lower courts are bound to follow it in future cases; if it is dicta, their only obligation is to give his reasoning respectful consideration.

No doubt, the distinction between holding and dicta is central to the American legal system—in theory.[5] But theory is one thing, practice another.[6] The point of this essay is to ask how much is really at stake in this debate over whether the Roberts opinion is dicta and, more generally, whether a court opinion can be labeled as holding or dicta. Our concern is not the normative question of a how a court should act, but the empirical question of how much difference the distinction makes to the impact the Court's language has on lower court's decisions.

This essay speaks to the continuing vitality of the holding-dicta distinction through the first systematic study of how lower courts treat higher court dicta.[7] As we will show, the gap between dicta in theory and dicta in practice is strikingly large. Lower courts often mention the distinction between holding and dicta but hardly ever invoke it in

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about-chief-justice-s-health-care-ruling-could-have-lasting-impact; Gideon, *The Language About the Commerce Clause Was Non-Binding Dictum*, DAILY KOS (June 29, 2012, 6:57 PM), http://www.dailykos.com/story/2012/06/29/1104308/-The-language-about-the-Commerce-Clause-was-non-binding-dictum; William A. Jacobson, *What if That Huge Conservative Doctrinal Achievement Was Mere Dicta?*, LEGAL INSURRECTION (June 29, 2012, 4:36 PM), http://legalinsurrection.com/2012/06/what-if-that-huge-conservative-doctrinal-achievement-was-mere-dicta/.

[5]Most notably, the holding-dicta distinction reflects the common law precept that legal principles develop incrementally, with any one decision having only a limited impact. *See generally* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997 (1994); Pierre N. Leval, *Judging Under the Constitution: Dicta about Dicta*, 81 N.Y.U. L. REV. 1249, 1259-60 (2006). The Supreme Court has long recognized that statements that "go beyond the case" "may be respected, but ought not to control the judgment in a subsequent suit." Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399-400 (1821)

[6] Academic studies of the holding-dicta distinction have largely focused on the drawing of the line separating holding from dicta. *See* Dorf, *supra* note 5; Kent Greenwalt, *Reflections on Holding and Dictum*,39 J. LEGAL EDUC, 431 (1989); Michael Abramowicz and Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953 (2005).

[7] The holding-dicta distinction is also relevant to higher court consideration of its own precedent. We focus on the vertical relationship between higher and lower courts both because of the centrality of this dynamic to the future of common law judging and because it is capable of empirical assessment. In Part III of this essay, we detail the ways in which our findings speak to the vitality of common law judging. *See infra* notes 51-61 and accompanying text. For a discussion of the difficulties of evaluating higher court treatments of its own dicta, see *infra* text at pages 11-12.

consequential ways. In calendar years 2008-2010 (the focus of this study), while nearly 14,000 out of about 700,000 Westlaw-reported cases contain allusions to the distinction, there are only around 220 cases where lower courts refuse to follow a directive from a higher court because they regard it as dicta.[8] This means that lower courts make meaningful use of the holding-dicta distinction in less than one in every three thousand cases.

In our view, the disjunction between dicta in practice and dicta in theory in lower court decision-making has important descriptive and normative implications. The power of lower courts to interpret higher court rulings and, in so doing, demarcate the line that separates dicta from holding is a key constraint on the hierarchical relationship between higher and lower courts. Lower courts' willingness or reluctance to assert their own authority by challenging dicta fundamentally affects the ways in which higher and lower courts speak to each other and shape the law.[9]

Even more importantly, in the traditional image of common-law judging, broad doctrine emerges over time as principles uniting individual cases come into focus.[10] Under this view, lower courts play a critical role in the development of legal principles by exercising their own judgment as to the implications and applicability of past decisions. Treatments of dicta as holding disrupt this process by permitting more sudden and sweeping changes in doctrine.

Relatedly, the vitality of the dicta-holding distinction is highly relevant to the ongoing debate over judicial minimalism. Minimalists argue that narrow, fact-specific holdings are less prone to factual error and more likely to facilitate constructive conversations among courts, elected officials, and the American people.[11] Whether or not these claims are

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[8] We present detailed data and findings in Part II.

[9] This is not to say that lower courts always rule in ways consistent with higher court dicta. It is possible, for example, that lower courts evade the force of higher court dicta by making precedent-based distinctions. At the same time, for reasons we will discuss *infra* notes 51-54 and related text, lower courts still bow to the authority of higher courts by pursuing such middle course alternatives.

[10] Michael Dorf describes this process as lower court "elaboration" of higher court precedent and distinguishes it from the "execution" model, where lower courts believe "that their job is to execute the law as found in already decided cases, not to craft novel interpretations" Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 664 (1995).

[11] For general treatments of judicial minimalism, *see generally* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999); Christopher J.

correct, lower court treatments of dicta as holding complicate the pursuit of the judicial minimalists' project. In particular, judicial minimalism looks to lower courts to examine the workability of higher court precedent in different factual contexts (including changes brought about by social and political developments).[12]

The paper proceeds in three parts. We begin by describing the centrality of the holding-dicta distinction to both the development of law and to the broader academic debate about whether courts should issue minimalist decisions. In the second section, we describe our sample of federal and state court decisions, explain and illustrate our coding criteria and decisions, and present our findings, casting doubt on the willingness of lower courts to participate in a dynamic interchange with higher courts in the development of legal principles. We conclude with a preliminary assessment of the ramifications of this study for the dynamic between higher and lower courts and the vitality of traditional common law judging.

I. The Dicta-Holding Distinction in Theory

The distinction between holding and dicta reflects fundamental norms of American law, from the common law precept that legal principles develop incrementally, with any one decision having only a limited impact, to Article III's requirement that judges decide concrete disputes and not issue advisory opinions. As Karl Llewellyn put it, a "court can decide only the particular dispute which is before it… Everything, everything, everything, big or small, a judge may say in an opinion is to be read with the primary reference to the particular dispute, the particular question before him."[13]

The importance of the distinction to legal theory is highlighted from the beginning of a lawyer's training. Law students are often taught that the American legal system sees dicta as neither binding nor normatively desirable and typically spend significant time and energy

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Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454 (2000). Neal Devins, *The Democracy-Forcing Constitution*, 97 MICH. L. REV. 1971 (1999).

[12] Judicial minimalism likewise asks higher courts to revisit their own precedent by looking at subsequent factual developments as well as the actions of elected officials and the American people. *See* SUNSTEIN, *supra* note 11.

[13] KARL LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA 42-43 (1989).

looking for the line separating the two.[14] In constitutional law, students learn that the very case that established judicial review, *Marbury v Madison*, is filled with dicta. Specifically, because the Court discussed the merits of the *Marbury* dispute before concluding that the Court was without jurisdiction to rule in favor of the plaintiff, *Marbury* is often depicted as a prime example of judicial overreaching.[15] More tellingly, the case method that dominates legal instruction teaches students that the legal craft is about the careful reading of cases and, with it, the ability to separate holding from dictum. For law students, to treat dicta as holding is to misunderstand the case before them.

The importance of the distinction is also reflected in concerted efforts by scholars to delineate it[16] and by the fact that lawyers and judges speak of it so often. As we will explain shortly, we found (over a three year period) several thousand cases per year where judges used the term "dicta" or "dictum" in an opinion. During the same three year period, there were 8, 406 references to dicta in federal court of appeals briefs and 12,946 references in state court of appeals and state Supreme Court briefs.[17]

The reason the dicta concept matters so much to theory and, in our view, deserves far more empirical attention, is that it gets to the core of how the law is made in a system of precedent. Where few efforts are made to distinguish dicta from holding, the dynamics of judicial decision making will resemble what Michael Sean Quinn has called an "Imperial Theory" of precedent. Under this approach, "when a principle of law has been deliberated upon (i.e., thought about), expressly formulated, and posited as

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[14] Judge Pierre N. Leval went so far as to argue that law students "are not well trained for the profession" if they do not understand the difference between holding and dicta." Leval, *supra* note 5, at 1254, 1282.

[15]In particular, since the Court ruled against Marbury on jurisdictional grounds, the Court's discussion of whether Marbury was entitled to a judicial commission had nothing to do with the ultimate resolution of the case. Academics and law school casebooks regularly call attention to this fact, typically to question this aspect of the Court's decision. For one particularly well known example, see William Van Alstyne, *A Critical Guide to* Marbury v Madison, 1969 DUKE L.J. 1. For an alternative view, see Neal Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1736 (1998) (defending Marshall's "advicegiving" in Marbury).

[16] For a sampling of this literature, see *supra* note 6.

[17] These numbers are based on a Westlaw search of "dicta" or "dictum" in the databases of federal court of appeals briefs and state courts of appeals/Supreme Court briefs. *See* Memo from Fred Dingledy,, Referece Librarian, to Professor Neal Devins (July 30, 2012) (copy on file with).

law by an appellate court, it must be followed in similar cases."[18] The result is a system of concentrated lawmaking power. "The past dominates the present. Higher courts dominate lower courts. Any feedback from lower courts to higher courts is accomplished informally. Lower courts have little discretion."[19]

In contrast, the more religiously courts observe the distinction between holding and dicta, the more closely we can expect the system of precedent to correspond to a traditional view of common law judging. In this view, the law making power of the precedent-setting court is more circumscribed and law develops more flexibly. As Edward Levi put it, in his classic book on legal reasoning, "the doctrine of dicta leaves" the judge deciding a case to make her "own decision."[20] She "is not bound by the statement of the rule of law made by the prior judge even in the controlling case. . . . It is not what the prior judge intended that is of any importance, rather it is what the present judge, attempting to see the law as a fully consistent whole, thinks should be the determining classification."[21] Under this traditional view, lower courts both reason by analogy and take into account changing conditions (factual or policy developments) when "elaborating" on higher court precedent.[22]

What is at stake is not just how the law is made, but *how well* it is made. Much of the legal literature about dicta (and the related prohibition of advisory opinions) at least implicitly favors the traditional approach to precedent.[23] In explaining why dicta need not be followed, for example, Michael Dorf advances both legitimacy arguments ("courts have legitimate

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[18] Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 CHI.-KENT L. REV., 655, 698 (1999). *See also* Dorf, *supra* note 10 at 664-68 (discussing "execution" theory of precedent and distinguishing it from the "elaboration" theory of common law decision making).

[19] *Id.* at 704.

[20] EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING, 2 (1948).

[21] *Id.* at 2-4.

[22] Dorf, *supra* note 10, at 665-67.

[23] For a general treatment of the prohibition against advisory opinions, see Phillip M. Kannan, 32 U. RICH. L. REV. 769 (1998). Unlike federal courts, some state courts are required by either statute or state constitutional provision to render advisory opinions, see Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1845-46 (2001).

authority only to decide cases, not to make law in the abstract") and instrumental arguments ("dicta are less carefully considered than holdings, and, therefore, less likely to be accurate statements of law").[24] Correspondingly, scholars who embrace judicial minimalism caution that courts must recognize limits in their ability to craft doctrinal solutions that are workable over a broad range of issues. By limiting their rulings to the case before them, judges can learn about the consequences of different legal holdings and pursue an "empirically informed" jurisprudence in which judicial errors are "less frequent and (above all) less damaging."[25] When "the relevant facts are in flux and changing very rapidly, and the consequences of current developments are hard to foresee,"[26] courts should exercise caution to avoid risking populist attacks on their legitimacy and reprisals from elected officials.

Dicta, no doubt, are disfavored by courts and most legal scholars. At the same time, some scholars who caution against the use of dicta recognize that judicial advice giving is not always inappropriate.[27] For example, a higher court that invalidates governmental conduct on statutory grounds might nonetheless signal that the constitutionality of the statute is also in doubt (so that an agency or legislative body should not assume that the government can pursue its favored policy without risking a constitutional challenge).[28] More significantly, some scholars embrace either informal judicial advice giving or the formal issuance of broad judicial rules. "The most obvious advantages of advicegiving," according to Neal Katyal, "flow from its nature as dicta, particularly its ability to mediate the tensions in a system of law based on stare decisis. . . . Advice in judicial decisions acts as a compromise—such language does not have the binding force of a holding yet provides some guidance and predictability

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[24] Dorf, *supra* note 5, at 2000-01. *See also* Leval, *supra* note 5, at 1255-60 (offering both legitimacy and instrumental arguments to caution against the reliance on dicta).

[25] SUNSTEIN, *supra* note 11, at 255, 4.

[26] *Id.* at 174.

[27] For an argument that advice giving is inevitable, see Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 655 (1995) (arguing that appellate courts inevitably give advice because the reasons they give for their decisions are always more general than the specific proposition before the court).

[28] Dorf, *supra* note 5, at 2006-07.

for the future while simultaneous undermining some of the reliance interests that would mandate future application of stare decisis."[29]

A judicial formalist might go one step further, calling for high courts to bind lower courts through broad judicial rulings—rulings that may speak to a range of issues not directly before the court. Recognizing that "an important function of law is to settle authoritatively what is to be done,"[30] one could view binding, authoritative settlements of legal disputes by high courts as salutary. Authoritative settlement may also solve coordination problems (related to the uncertainty of knowing whether a legal ruling will or will not apply in factually distinguishable cases) and, as such, serve efficiency values.[31] Larry Alexander and Fred Schauer put it this way: "Coordination and the settlement of disagreements—and the individually and socially beneficial goods these goals produce—provide content-independent reasons for the existence of the state, of law, and of the obligation of obedience to the law."[32]

These competing normative perspectives on judges' role in the development of law imply different views of where the line between holding and dicta should be drawn. Judicial minimalists would likely embrace a narrower view of what constitutes a holding and, in so doing, categorize as dicta any language that is not necessary to the resolution of a dispute before the court. Under this view, lower courts have substantial authority to shape the development of law by enforcing the holding-dicta distinction and otherwise engage in common law judging. Formalists would likely prefer broad, authoritative judicial opinions and be more likely to treat such statements as part of the court's holding. More fundamentally, formalists look for higher courts to law down rules that will constrain the discretion of lower court judges.

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[29] Katyal, *supra* note 15, at 1711.

[30] Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1371 (1997). For a competing perspective (arguing that stability in the law is best achieved through a dynamic process in which other parts of government challenge Court rulings), see Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83 (1998)

[31] *See* Larry Alexander, *"With Me, It's All er Nuthin": Formalism in Law and Morality*, 66 U. CHI. L. REV. 530, 533-35 (1999).

[32] Alexander & Schauer, *supra* note 30, at 1374.

In the next section, we investigate whether the role actually played by lower courts comes closer to a minimalist ideal or a formalist ideal More precisely, we ask how often judges identify a precedential statement as dicta and decide at least some question in the case differently than they would have if they saw the language as a holding. In doing so, we recognize that the behavior of lower courts is only part of the story—for higher court treatment of its own dicta also speaks to both the salience of the holding-dicta distinction and the debate between minimalists and formalists. Nonetheless, we believe our focus on lower courts is the best place to start looking at the real world importance of the holding-dicta distinction.

In part, as we will soon detail, lower court invocations of the distinction are better suited to empirical measurement than are higher court invocations. More significantly, the behavior of lower courts is crucial to the common law system of judging. Because cases originate in lower courts and the vast majority are terminated there, it is lower courts' treatment of dicta that matters most for how the legal system operates. Even if higher courts freely disregard their own dicta, if lower courts do not – that is, if lower courts treat dicta as holdings – then dicta will be part of the law as experienced by lawyers, litigants, and potential litigants.

II. The Distinction in Practice

We are not the first to wonder how well theory and practice align when it comes to dicta. In fact, there have been fairly frequent reports in recent years of failures to distinguish between dicta and holding. Academics contend that judicial opinions "are often larded with dicta," including "passing observations, generalizations, analogies, illustrations, or asides not necessary to the resolution of the case." [33]A federal circuit judge writes: "I cannot tell you how many times I have read briefs asserting an improbable proposition of law and citing a case as authority. . . [only to find that] the proposition is indeed there, but was uttered in dictum" [34]

Still, these reports are largely impressionistic and not specifically focused on the behavior of lower courts. Determining how important the dicta distinction is to lower court judging requires systematic investigation

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[33] EVA HANKS, MICHAEL E. HERZ, & STEVEN S. NEMERSON, ELEMENTS OF LAW 64 (2d ed. 2010).

[34] Leval, *supra* note 5, at 1263. *See also* Thomas L. Fowler, *Holding, Dictum…Whatever*, 25 N.C. CENT. L.J. 139 (2002-2003); Judith M. Stinson, *Why Dicta Becomes Holding and Why it Matters*, 76 BROOK. L. REV. 31 (2010).

of how dicta from above is treated.[35] We provide that here, examining how often, when judges see a precedential statement as dicta, they decide at least some question in the case differently than they would have if they saw the language as a holding.

Our investigation is inevitably somewhat complicated, for the mere fact that a court invokes the distinction or refers to a statement as "dicta" does not mean that the distinction has real consequences for the judge's actions. For instance, it is common for a court to describe a statement from another court as dicta but decide consistently with that statement. In that situation, the distinction plays no role in the decision; the end result is precisely the same as if the statement were classified as a holding. To understand the role of dicta and holding in judicial decision making, it is crucial that we identify criteria for determining when the distinction actually produces a decision or opinion that is different in important ways from what would have been produced in a system that does not recognize the distinction.

For this very reason, there is much more to be learned from examining how lower courts treat dicta from higher courts than examining how higher courts treat their own dicta. Consider, for example, a case in which a higher court judge justifies discounting its own precedent on the ground that it is dicta. When this occurs, there is no way of knowing whether the judge would have reached the opposite result if she had thought the precedent was a holding, not dicta. Even assuming that the norm of *stare decisis* matters to judges, the fact is that they can normally overrule, limit, or otherwise change precedents they dislike at will.[36] It seems certain that in at least some (and perhaps many) cases labeling precedent from one's own court as dicta is a largely rhetorical move, used to justify an action the court would have taken anyway. If the concept of dicta did not exist, the decisions in these cases would be no different. Of course, we

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[35] The closest to such an investigation is Josh Blackman, *Much Ado About Dictum*, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1318389, in which the author read all cases identified by West as discussing the concept of dictum to catalogue the approaches courts put forward for distinguishing between holding and dicta and responding to dicta.

[36] *Stare decisis*, of course, does not apply to situations where higher courts review lower court decision-making. Consequently, when higher courts reference dicta in lower court decision-making, it is impossible to draw any conclusions about whether the fact of its being dicta was important to its decision.

cannot be certain that this is true in any particular case, but we do feel certain that to count all such cases as examples of the distinction's having meaningful influence would overstate that influence.

In contrast, when a lower court avoids the force of a higher court statement by labeling it dicta, we can be more certain that the dicta distinction played a key role in its thinking. A lower court is considered bound by the precedent of the court or courts above it. It would be a violation of its professional obligations for it to fail to apply the precedent where it is relevant, and this failure would be expected to bring both reversal by the higher court and censure from the bar and bench. When a lower court invokes the concept of dicta as the basis for evading the force of a higher court's statement, it concedes that it otherwise would be obligated to apply it. More than this, it calls attention to its refusal. Hence, the rhetorical role played by the distinction is quite different from in the higher court – inviting examination and criticism rather than deflecting them.

Thus, we focus in this paper on cases where a court identifies a statement from a court above it in its hierarchy as non-binding dicta. For each such case, we determine whether the holding/dicta distinction plays a central role in justifying a decision at odds with the higher court's statement. In this section we explain the criteria we relied on to make this determination, demonstrate how they were applied, and report our findings about the general unwillingness of federal courts of appeals, federal district courts, and state courts to invoke the holding-dicta distinction in consequential ways. Before doing so, we describe our search method and sample.

A. The Cases

Our data are drawn from opinions handed down from the beginning of 2008 to the end of 2010 by U.S. federal and state trial and intermediate appellate courts. These opinions were identified through full-text searches in Westlaw for the terms "dictum," "dicta," "not a holding," or "not the holding." Both formally published and unpublished opinions are included.

The search yielded 1649 cases from the U.S. Courts of Appeals, 8809 cases from U.S. District Courts, and 3365 cases from state trial and intermediate appellate courts. Because this was too many cases to code, we randomly sampled several hundred cases from each set: specifically, 330 (20%) from the U.S. Courts of Appeals, 440 (5%) from federal district courts, and 336 (10%) from state courts. Before proceeding, it is worth noting that 13,823 hits in these three years strikes us as conclusive evidence

that the concept of dicta is alive and present in judges' minds. What it does not tell us is whether the concept is consequential for their decision making.

To address this question, we must look at the sample of 1106 cases more closely. First we must isolate those cases where the opinion of the court identifies a statement from a hierarchical superior as dicta or denies that it is a holding. A total of 213 cases fit this criterion. Of the 893 cases that do not, 201 involve references to the citing court's own precedent, 264 involve references to precedent from another court with no authority over the citing court, and 428 do not involve a reference to precedent. (The references in the last category took a variety of forms, such as abstract discussions of the concept, quotations in which a scholar or another court referred to a statement as dicta, and rejections of litigants' claims that certain statements were dicta.[37])

For the remainder of this paper, we focus on the 213 cases in which a lower court identified a statement from a higher court as dicta. Each of the 213 was coded independently by two different coders to determine whether the dicta-holding distinction could reasonably be seen as playing a key role in the court's decision. Where both coders reached the same conclusion – either positive (that the distinction could be viewed as having affected the decision) or negative (that it could not) – that conclusion was accepted. In the twenty-eight cases where the coders reached different conclusions or doubt was expressed by the coder in either evaluation, the case was re-analyzed and discussed until a confident conclusion could be reached. Where we were unable to decide with confidence, the case was recorded as a positive example.

B. Findings

As became abundantly clear very early in this study, the mere fact that a lower court identifies a statement from a higher court as dicta does not mean that is unwilling to act as if the statement were a holding. In fact,

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[37] Notably, a number of these cases involved quotations of *Williams v. Taylor*, 529 U.S. 362 (2000), where the Supreme Court, interpreting language in the Antiterrorism and Effective Death Penalty Act of 1996, said that in habeas corpus proceedings, "'clearly established Federal law'… refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision" *Id.*. at 412. A handful of cases in this category did involve references to precedent but were excluded because the references appeared in a concurring or dissenting opinion, not the opinion of the citing court.

sixty-eight (32%) of our cases are examples of unambiguously positive citations, where the statement in question is cited in support of a particular proposition and the citing court gives no indication that it is free to disregard the statement. The only thing distinguishing these from ordinary positive citations is that the citing court identifies the statement, in passing, as dicta.

Some of these are just casual references in string citations. [38] Many are more substantive. For instance, in a 2009 case, the Court of Appeals of Oregon justified a decision this way:

> We base that conclusion on two factors... Second, in *Moore v. Motor Vehicles Division*, 293 Or. 715, 724, 652 P.2d 794 (1982), the Supreme Court (in *dictum*) stated, "An administratively imposed penalty based on [a legally unauthorized] procedure would be invalid." In light of the foregoing, we allow the petition for reconsideration and now hold that the suspension of petitioner's driver's license is reversed.[39]

Another example, striking but not atypical, comes from an opinion from a federal judge in New Jersey considering the implications of a U.S. Supreme Court holding and dicta from the Third Circuit:

> The holding of *Sell* is consistent with dictum in *Rennie*, which instructs that, in an emergency, antipsychotic drugs may be constitutionally administered only when "such an action is *deemed necessary* to prevent the patient from endangering himself or others. Once that determination is made, professional judgment must *also* be exercised in the resulting decision to administer medication." 720 F.2d at 269–70 (emphasis added). This portion of *Rennie* is important in two respects… Taken together, therefore, *Sell* and *Rennie* endorse the proposition that

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[38] *E.g.*, IGY Ocean Bay Props., Ltd. v. Ocean Bay Props. I Ltd., 534 F. Supp. 2d 446, 448 (S.D.N.Y. 2008) ("However, diversity does not exist within the meaning of these sections where on both sides of the dispute the parties are all foreign entities, or where on one side there are citizens and aliens and on the opposite side there are only aliens."); *see* Universal Licensing Corp. v. Paola del Lungo S.P.A., 293 F.3d 579, 580-81 (2d Cir. 2002) (citing Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 381 (1959) (dictum) and Dassigienis v. Cosmos Carriers & Trading Corp., 442 F.2d 1016, 1017 (2d Cir. 1971) (per curiam)).

[39] *Hays v. Driver and Motor Vehicle Services Division*, 216 P.3d 902, 903 (Or. Ct. App. 2009)

> medical authorities must consider lesser-intrusive alternatives before involuntarily administering medication.[40]

In an additional fifty-three cases (25%), the dicta statement is simply mentioned in passing in a peripheral section of the opinion. The lower court does not cite the statement for support, but neither does it deny that the statement is authoritative or decide in a way inconsistent with it.

(At this point, some readers may be wondering why a court would bother to point out that a statement is dicta if it is relying on the statement for support or sees it as irrelevant to its analysis. We confess that we too are puzzled by this. Our best guess is that the habit of distinguishing between dicta and holding is so ingrained that judges often make the distinction automatically even when nothing hinges on it.)

In the remaining ninety-two cases (43%), the citing court did either state or imply that what it called dicta was entitled to less weight than it would carry if a holding. Nevertheless, most of these cases do not allow a reader to conclude that the court's opinion would have been different in any important way if it had considered the higher court's statement a holding.

In twenty of these cases, the lower court indicated that the dicta statement had been superseded by subsequent holdings by the higher court. Because even holdings are superseded by subsequent holdings, in these cases the fact that the lower court considers a statement dicta plays no role in its treatment of it.

In another sixteen cases, we coded the dicta statement as "non-directive." What we mean by this is that the statement from the higher court, even if considered binding, could not be understood as imposing a requirement on the lower court to analyze or decide an issue in a particular way. Consider the case of *Humphrey v. Sapp*.[41] There the district court confronted this statement from the Sixth Circuit: "[Absolute] immunity extends to unintentional errors in the petition [to remove children from their parents' custody]." Had the question before the district court been whether to recognize absolute immunity for an unintentional error, this certainly would have counted as a directive statement. However, the actual case before the district court involved an intentional misrepresentation. As the district court noted, the circuit court's statement could be read to "imply

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[40] *Brandt v. Monte*, 626 F.Supp.2d 469, 488 (D.N.J 2009)

[41] 2010 WL 1416705, W.D. Ky (2010).

that an *intentional* misrepresentation in a petition is *not* protected by absolute immunity."[42] Yet it does no more than imply this (if it even does), and a lower court that ruled that immunity does apply in cases of intentional immunity could not fairly be criticized for failing to follow precedent. In such cases, the decision to treat a statement as dicta or holding makes no difference; what matters is that the statement does not tell a lower court what it should do.

In an additional twenty-three cases, after calling into question the authority of a precedent from a higher court, the lower court distinguished the precedent or otherwise indicated that the issue involved was irrelevant to the decision before it. Most such cases were easy to code, but we give as an example one that required more judgment.

In *U.S. v. Henderson*[43] police went to Henderson's home in response to a report of domestic abuse. They entered the home, Henderson ordered them out, and they arrested and removed him. After he was removed, his wife consented to a search of the house. The police discovered weapons and drugs, and Henderson was indicted for weapon and drug crimes. At his trial, he moved for suppression of the evidence from the search, as he had expressly refused permission for the search before being removed

The key passage for the dicta analysis was from the Supreme Court's opinion in *Georgia v. Randolph*. In *Randolph*, the Court allowed co-tenants to authorize such searches "[s]o long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection."[44] In *Henderson*, the First Circuit opined that the *Randolph* Court's "passing reference to pretextual arrests carried out for the purpose of evading an objection to search was not a holding" but immediately continued:

> In any event, the Court's dicta should not be overread to require the invalidation of an otherwise valid third-party consent search where the objecting tenant is removed from the home based on a legitimate, nonpretextual arrest. Here, Henderson was validly arrested based on probable cause to believe he had committed a domestic battery; there is no evidence to suggest he was removed

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[42] Id. at fn. 3.

[43] 536 F.3d 776 (1st Cir. 2008)

[44] 547 U.S. 103, 121 (2006).

> from the home "for the sake of" evading his objection to the search.[45]

The circuit judges explicitly state that the line relied on by the defendant is dicta, and it may be that the belief that it was dicta played a part in their decision. However, this is clearly not the crux of the argument. The circuit judges' main point is that the line from *Randolph* does not address the rights of the objecting tenant in the situation where he is validly arrested (as, all agreed, *Henderson* was). If the above passage from *Henderson* did not include the sentence about "passing reference" and the sentence following it were rewritten as "In any event, the Court's *holding* should not be overread," the argument would not lose any force.

In cases such as this, where a statement that might be considered dicta is immaterial to a decision now before a court, the decision whether or not to treat it as dicta is necessarily also immaterial; the lower court's decision will be the same either way. Note that in evaluating relevance, we approached the question from the perspective of the deciding court. That is, if the lower-court opinion writer treated the issue involved as one that required a decision in the case now before the court, we coded the dicta-statement as relevant. We did not ask whether, in some objective sense, it appeared necessary to decide the issue. We coded it as irrelevant only if the lower court indicated that it was unnecessary to decide the issue.

Finally, in sixteen cases, despite denying implicitly or explicitly that it was bound by the higher court's statement, the lower court nevertheless decided the relevant issue consistently with that statement. Here, too, each lower court decision would have been the same in all important respects in a world where no distinction was made between dicta and holding. They do not count as consequential invocations of the distinction.

In the end, our examination of 213 cases uncovered seventeen consequential invocations of the distinction—that is, seventeen cases where there are strong grounds for concluding that the lower court would have decided some issue differently if it had understood the higher court's statement to be a holding rather than dicta. As shown in Table 1, the numbers break down as follows by type of court: four in the U.S. Courts of Appeals, seven in U.S. District Courts, and six in state courts.

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[45] *Henderson*, 536 F.3d at 781 n.5 (citations omitted).

Recall that we could not examine all of the cases returned by our Westlaw search; rather, we sampled 20% of the circuit court cases, 5% of the district court cases, and 10% of the state cases. Thus, to generate estimates of the total number of consequential invocations from 2008 to 2010, we must multiply the totals by five, twenty, and ten respectively. Doing those calculations yields our best estimates of twenty total cases in the U.S. Courts of Appeals, 140 total cases in U.S. District Courts, and sixty total cases in state courts for the entire three-year period.

	U.S. Circuit Courts	U.S. District Courts	State Courts	Total
Positive Citation	16	33	19	68
Passing Reference	7	22	24	53
Dicta Superseded	1	15	4	20
Dicta Non-Directive	3	10	3	16
Dicta Irrelevant	10	7	6	23
Decision Consistent with Dicta	5	7	4	16
Consequential Invocation	**4**	**7**	**6**	**17**
Total	46	101	66	213

In our view, these numbers are remarkably low, especially when one considers baselines. The Westlaw database contains 80,421 cases decided by circuit courts between 2008 and 2010, 327,524 cases decided by district courts, and 295,452 decided by state courts. Thus, our results indicate that the distinction between dicta and holding plays an important role in lower court decision making in fewer than one in every two thousand federal district court cases (140 out of 327,524) and in fewer than one in every four thousand state court (60 out of 295,452) or federal circuit court (20 out of 80,421) cases. Combing all cases, we estimate that consequential invocations of the dicta-holding distinction occur about once in every 3200 cases (220 out of 703,397).[46]

[46] While the Westlaw database is fairly complete, not all court opinions are submitted to it, so that there may be some cases unavailable to us that would have met our criteria for counting. However, because the sample of cases not contained on Westlaw is likely to be skewed toward routine or procedural dispositions, it is highly probable that it contain a smaller proportion of consequential invocations. Surely it is safe to assume that the incidence of consequential invocations is not significantly higher in the missing cases.

We acknowledge that some difficult judgment calls underlie these estimates and recognize that other scholars might consider some cases we excluded to be consequential invocations. That said, we are confident that the number of such cases would be too small to change the central message of our findings. Furthermore, disagreements would not necessarily go in only one direction; other scholars might reject some of the cases that made it into our count.[47]

We also acknowledge that our Westlaw search strategy probably missed some case where lower courts confronted dicta from higher courts but did not draw attention to the fact that the statements were dicta. It is, of course, possible that in some such cases the lower courts chose to disregard statements that otherwise would have provided important guidance for their decisions precisely because they were dicta. However, we think it highly unlikely that there are a substantial number of such cases. As we have already demonstrated, it is considered perfectly appropriate for a lower court to point out that a statement from a higher court is dicta, and they are not reticent about doing so. On the other hand, we suspect that very few judges would purposefully engage in unprofessional conduct by pretending not to notice a statement from a higher court that appears to bear on the case being decided. We think it far more likely that missing cases involve positive treatments of dicta: lower courts do not bother to point out that a statement is dicta because they are drawing on it for guidance or support regardless of its status. Thus, if the missing cases could somehow be identified and analyzed, the ratio of positive to negative citations of dicta would be even higher than it is in our study.

Ultimately, then, we are confident that the picture we present is accurate in its essentials: the dicta-holding distinction plays a very limited role in lower court decision making. The average contemporary judge could expect to go years at a time without relying on the concept to reach a decision. For most lawyers, seeing a court disregard a significant statement from a higher court because it is dicta will literally be a once-in-a-lifetime experience.

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[47] To enable readers to judge our choices for themselves, we have prepared an appendix listing the coding for each of the 213 cases we examined in detail. That appendix can be found at law review website (or author website).

III. IMPLICATIONS

Our findings suggest that there is a dramatic gulf between dicta in theory (where the line separating dicta from holding is extremely consequential) and dicta in practice (where the dicta-holding distinction seems largely irrelevant). This gulf matters, because by not invoking the distinction, lower courts affect both the balance of power between themselves and higher courts and the possibility of minimalist common law decision-making. In this Section, we examine the implications of our findings for the dynamics of lawmaking in American courts and for the practice of lawyers in those courts.

A. Lower Court-Higher Court Dynamics.

Before we begin, it is important to note that the case for the importance of our results rests on a premise that higher courts frequently include statements that could reasonably be regarded as dicta in their opinions. Although we recognize that we cannot definitely establish this premise, it is highly consistent not only with commentary from academics and judges,[48] but also with evidence from this study. Recall that in the sample we analyzed, we found nearly 700 cases where a statement from a court was labeled "dicta" or "dictum."[49] Extrapolating to the cases that were returned by our search but not read, we can assume that there were several thousand such cases from 2008 to 2010. Even recognizing that a non-trivial portion of the labeled statements could not be considered statements of law, we are left with a very large number. And these are just the instances where a statement was tagged as dicta. We have no way of knowing how many times lower courts quietly followed a higher court despite doubts about whether what it was following was a holding.

Similarly, even though some dicta doubtless escapes lower courts' notice, this phenomenon cannot explain the near abandonment of the holding-dicta distinction by lower court. We certainly take the point of commentators who suggest that, because of changing norms and practices in both opinion-writing and legal research, lawyers and judges have become less alert to the distinction between holding and dicta.[50] For example,

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[48] *See supra* notes 33-34.

[49] *See supra* note 37 and accompanying text.

[50] *See* Fowler, *supra* note 34; Stinson, *supra* note 34. *See also* Leval *supra* note 5, at 1263 (noting that advocates often treat dicta as holding in their briefs).

today's lawyers are trained to do legal research by looking at key words in large data bases; the result is that far less time is spent reading cases and there is far less awareness of whether language in a judicial opinion is central to the case holding. Judges and their clerks make use of these same databases. Nevertheless, it is obvious from the numbers just reviewed that failure to detect dicta cannot explain what we have observed. Judges spot dicta often enough for the identification of it to play a major role in their decisions, but it does not.

It seems, then, that what we have found must be attributed at least partially to frequent decisions to abide by statements from higher courts even though they are recognized as dicta. In making these decisions, judges profoundly affect hierarchical dynamics in courts. They also shape the way in which law is produced and developed in the judicial system as a whole, moving its dynamics markedly away from the shared incremental decision making envisioned in traditional conceptions of common law judging and by contemporary minimalists and enabling bold lawmaking dominated by higher courts.[51]

This is true regardless of whether lower courts voluntarily embrace dicta or follow it unwillingly. If lower courts follow dicta against their wishes, we might expect to find them more assertive about their prerogatives elsewhere. For example, lower courts can constrain higher court lawmaking through their power to interpret, limit, and distinguish higher court precedents. But if they willingly embrace dicta, we should expect to find them ceding power to higher courts in other respects too. Consequently, an understanding of why lower courts accept dicta could provide insight into whether the deference found here is likely to hold in other aspects of their decision making

To the extent that judges follow dicta unwillingly, it is almost certainly because they wish to avoid being reversed by a higher court.[52]

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[51] The effects of lower court choices may extend well beyond the specific cases before them by providing higher courts with an incentive to address issues not immediately before them—knowing that lower courts would follow such declarations. In this way, the minimalist project of incremental judicial decision-making might be further undermined in favor of a hierarchical system dominated by higher courts (something that formalists might well embrace).

[52] There is disagreement in the literature about the extent to which lower courts consider fear of reversal in their decision-making. *See, e.g.*, David E. Klein and Robert J. Hume, *Fear of Reversal as an Explanation of Lower Court Compliance*, 37 LAW & SOC'Y REV. 579 (2003); Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 404, 424

Reversal, of course, undermines the legal policy preferences of lower court judges. Furthermore, judges may be motivated by "(1) fear that their professional audience, including colleagues, practitioners and scholars will disrespect their legal judgment or abilities; (2) fear that a high reversal rate might reduce opportunities for professional recognition and advancement. . . . and (3) the perception that reversal undercuts their de facto judicial power."[53] And judges, trial judges especially, will not welcome the return of cases that they thought had been cleared from a crowded docket. It is a small step from the assumption that judges prefer not to be reversed to the assumption that they will generally avoid taking actions that invite reversals.

Of the steps that a lower court can take to evade the force of an opinion from above, calling a higher court's statement dicta would seem to be the most confrontational, short of outright defiance. Compare that practice with distinguishing, for example. The lower court distinguishing a precedent recognizes both the validity of the precedent and the lower court's general obligation to follow it; it only denies an obligation to follow it in this particular case, which it claims to be insufficiently related. In contrast, the court crying dicta denies that it would be obligated to follow the statement from the higher court in any circumstances; beyond this, it denies the validity of the statement as an expression of the law. The latter action is a much more direct challenge to the authority of the higher court and so could be expected to attract close scrutiny on appeal.[54] Knowing this, the lower court might accept guidance they would prefer to evade when the only available ground for evasion is the claim of dicta.

In this account, lower courts are reluctant enablers of higher court dicta; they would like to disregard it but fear the consequences. If this account is correct, then lower courts may be willing to employ less confrontational methods like distinguishing to reach results that they prefer

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(2007); Kirk A. Randazzo, *Strategic Anticipation and the Hierarchy of Justice in U.S. District Courts*, 36 AM. POL. RES. 669 (2008)

[53] Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 77-79 (1994). *See also* Dorf, *supra* note 10.

[54] Judges' reluctance to rely on the dicta concept may be heightened by the fact that the line between holding and dicta can be so hard to discern. "If the distinction between holding and dictum were clearly demarcated, lower courts might not hesitate to ignore higher court's dicta. Because the distinction has not been so demarcated, however, declaring a prior statement dictum is quite similar to overruling a previously established legal principle." Dorf, *supra* note 5, at 2027.

and, in so doing, shift control to a degree from the court that set the precedent to the courts applying it. Of course, in failing to challenge dicta, they would still cede much of their common law power to participate in a dialogue with higher courts and impose constraints on the lawmaking power of higher courts.

An alternative account is that lower court judges willingly embrace dicta: that is, they respect it because they want to, not because they think they have to. Dicta "can help clarify a complicated subject," and "can assist future courts to reach sensible, well-reasoned results."[55] For these and other reasons, it may simply be easier for a lower court facing a large caseload to follow cues from above without thinking too hard about whether those cues are authoritative. Or perhaps the lower court judges simply think it proper to defer to the views of higher courts even when those views are not technically binding. If this second account is correct, then we might expect them usually to forgo even distinguishing and other less confrontational means of asserting their own role in lawmaking. For good or ill, the development of doctrine will be dominated by higher courts, and the first announcement of a legal principle will often have a very strong influence on doctrine.[56]

Although our evidence does not definitively tell us whether judges follow dicta reluctantly to avoid being reversed or embrace it willingly, we think it is more supportive of the latter explanation. The most striking evidence is the large proportion of cases in which judges, though explicitly noting that a statement is dicta, rely on it for support or guidance.[57] Recall that those cases constitute nearly a third of our sample.

More subtly, the aversion-to-reversal account is undercut by the fact that judges use the terms "dicta" and "dictum" so often, even when discussing statements from higher courts. We encountered a number of cases where the lower court indicated quite clearly that the statement being cited was irrelevant to the case before it but added, unnecessarily, that the

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[55] Leval, *supra* note 5, at 1253

[56] Were this to happen, higher courts would have incentive to address issues not immediately before them—knowing that lower courts would follow such declarations. In this way, the minimalist project of incremental judicial decision-making might well be undermined in favor of a hierarchical system dominated by higher courts (something that formalists might well embrace).

[57] *See supra* notes 38-40 and accompanying text.

statement was dicta. Courts worried that claims of dicta will attract unwelcome attention would probably not include those gratuitous comments.

Furthermore (and perhaps more telling), the aversion-to-reveal account is undercut by comparing the practices of trial and appeals courts. Trial court decisions (at both the state and federal level) are often appealed; court of appeals decisions are rarely appealed. Furthermore, with larger jurisdictions, appellate courts can have a greater impact on the law and so have more to gain from bold actions that risk reversal. For both reasons, to the extent that fear of reversal animates lower court treatment of dicta, one would expect trial courts to tread more carefully in invoking the dicta concept. Our evidence, however, suggests the opposite. At the federal level, trial courts relied on the distinction in around one in 2,000 cases; appeals courts relied on it in around one in 4,000 cases.[58] While this evidence is not conclusive, it does cut against the fear of reversal account.

As interesting as this question is, it is not necessary to answer it here. For whichever account is more correct, the central lesson of our study remains the same: By so seldom invoking the distinction between dicta and holding in consequential ways, lower courts voluntarily cede an important element of their common law power. Our evidence makes clear that higher courts can safely assume that lower courts will not invoke the holding-dicta distinction to rein them in. Higher courts can issue sweeping rulings that address questions not immediately before them, knowing that those statements will not be treated as nonbinding dicta. Lower courts will either willingly accept them or will grudgingly accept them while perhaps seeking to limit their reach through their power to distinguish.[59] Lower courts, however, will not be active participants in the shaping of law in these cases. They will not treat these rulings as dicta and then seek to influence the

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[58] *See supra* text at p. 18.

[59]While we highlight two potential motivations for judges (fear of reversal and willful support of higher court authority), we certainly recognize that judicial decision-making, as Judge Richard Posner says, cannot be "reduced to a single dimension" but, instead, must take into account that lower court judges increase their utility by advancing their ideological agenda, "economizing on the judge's time and effort, inviting commendation from people whom the judge admires, benefiting the local community. . . and the list goes on." Richard A. Posner, *Judicial Behavior and Performance: An Economic Analysis*, 32 FLA. ST. U. L. REV. 1259, 1279 (2005). For our purpose, the key fact is that the failure to meaningfully invoke the holding-dicta distinction –*whatever the reason*-- fundamentally affects the power of lower courts to make use of their common law powers and, in so doing, affects the balance of power between lower and higher courts.

development of legal rules through incremental decision-making that builds upon the essence of the higher court ruling.

B. *Dicta in Theory versus Dicta in Practice.*

Our evidence suggests that the distinction between holding and dictum is at once central to the American legal system and largely irrelevant. Lawyers, judges, and academics refer to "dicta" and "dictum" all the time. But lower courts appear quite reluctant to rest decisions on the ground that dictum is not holding when it really matters. From a practicing lawyer's perspective, there is next-to-nothing to be gained by asking a lower court to treat higher court language as nonbinding dicta.

We do not claim that the holding-dicta distinction has no force whatsoever in judicial decision-making. After all, we found evidence that it mattered in some cases. And it may be that higher courts place more weight on the distinction in cases involving their own precedents—this seems especially likely in federal courts of appeals, where panels are typically expected to treat decisions from other panels in the same circuit as binding. Yet even though high courts are the most important source of precedents, trial and intermediate appellate courts are the main arenas in which those precedents play out. From the perspective of lawyers and litigants, law in practice is, most of the time, what lower courts make it; it makes little difference whether a higher court might one day repudiate a statement as dicta if at the moment it is tantamount to binding precedent. Understanding how lower courts treat dicta is crucial to understanding the dynamics of precedent, holding, and dicta in the legal system as a whole.

In drawing attention to gaps between theory and practice, in no way do we mean to suggest that scholars should abandon efforts to identify the line separating dicta from holding or otherwise desist from theorizing about dicta. Some of the reluctance of lower courts to make consequential use of the holding-dicta distinction may be tied to discomfort over the drawing of this line, a discomfort scholars could help alleviate. Even if not, if we are right about what is going on in practice, it is important for theorists to evaluate practice against normative standards and offer arguments for change if they believe lower court behavior is falling short of what it should be.

At the same time, there is a strong argument to be made that theory entirely divorced from practice can have only limited utility, especially insofar as it is aimed at lawyers in training or practice and is meant not only to identify normative ideals, but also to help clarify thinking about how law

operates. Ultimately, the ways of the law cannot be dictated entirely from the outside; in large part they must emerge from the actions of judges and lawyers over time.

In our view, then, theoretical scholarship is likely to be of greater value to the extent that it is informed by empirical research. This observation applies not only to the frequency with which the dicta-holding distinction is invoked, but also to how judges draw the line in practice. Notably, although we were unable to undertake a systematic analysis of the specific reasons lower courts gave for identifying language as dicta (and indeed courts did not always offer reasons), we very seldom ran across theoretically subtle arguments, such as that the higher court's ruling had swept too broadly. Instead, the typical statement identified as dicta was one where the higher court addressed an issue tangential to the ones before it, for instance commenting on one section of a statute when the case dealt with another section. We suspect that this represents another important gap, here between the grounds for identifying dicta put forward by theorists[60] or judges commenting on dicta in the abstract[61] and the grounds judges actually rely on in practice, with the latter being much narrower.

III. Conclusion

By shifting focus from dicta-in-theory to dicta-in-practice, our study illuminates the ways that the dicta-holding distinction matters to judging. By demonstrating that lower courts very rarely invoke the holding-dicta distinction to reach decisions at odds with higher court dicta, our study makes clear that dicta in practice is quite different from dicta in theory, at least when it comes to lower court decision-making. Neither the admonition against advisory opinions nor the common law's embrace of minimalist, fact-specific incremental decision-making has much impact on lower court judges when it comes to dealing with dicta; it seems that they do not see nullifying higher court rulings as non-precedential dicta as an important part of their jobs. The explanation for this is not simply that higher court rulings do not contain dicta or that lower courts can never sort out the line separating dicta from holding; the explanation is tied to some deeper understanding of the judicial function by lower court judges.

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[60] *See* Abramowicz and Stearns, *supra* note 6; Dorf, *supra* note 5; Greenwalt, *supra* note 6.

[61] *See* Blackman, *supra* note 35..

The disinclination of courts to challenge dicta from higher courts may well have profound effects on the balance of power in the judicial hierarchy. High courts, if they like, can speak to any number of questions not directly before them and expect lower courts to either follow their advice or make use of some precedent-based distinction to steer around their decision. Either way the power of higher courts is enhanced; dicta becomes holding in some fashion. For high courts interested in maximizing their power through broad rulings, the conflation of dicta and holding is a significant boon to their authority. In other words, our evidence suggests that the recent fight between Chief Justice Roberts and Justice Ginsburg in the health care decision was beside the point. For lower courts, the question is not whether the Chief Justice's commerce ruling was essential or "puzzling" and unnecessary;"[62] for lower courts, what matters is that the Supreme Court provided guidance on the scope of Congress's commerce power.

It may be no coincidence that in recent times higher courts, especially the U.S. Supreme Court, have taken steps to protect their turf as authoritative settlers of legal disputes. The Rehnquist and Roberts Courts, for example, have been criticized for embracing judicial supremacy, including the issuance of maximalist rulings intended to limit the discretion of other governmental actors.[63] Perhaps these attacks have been overblown at times, but it is indisputable that the Court has made strong claims about the need for adherence to Supreme Court pronouncements, most notably

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[62] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2629 & n.12 (2012) (Ginsburg, J., concurring). *See also supra* note 3 (discussing Roberts opinion).

[63] For critiques of the Rehnquist Court, see Ruth Colker and James J. Brudney, *Dissing Congress*, 100 Mich. L. Rev. 80 (2001); Robert C. Post and Reva B. Siegel, *Protecting the Constitution From the People: Juricentric Restrictions on Section Five Power*, 78 Ind. L..J. 1 (2003). For critiques of the Roberts Court, see Richard L. Hasen, *Money Grubbers*, Slate Magazine, Jan. 21, 2010, http://www.slate.com/articles/news_and_politics/jurisprudence/2010/01/money_grubbers.single.html; Adam Cohen, *Last Term's Winner at the Supreme Court: Judicial Activism*, July 9, 2007 http://www.nytimes.com/2007/07/09/opinion/09mon4.html; Dahlia Lithwick, *The Pinnochio Project*, Jan. 21, 2010 http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2010/01/the_pinocchio_project.single.html>

Court interpretations of the Constitution's meaning, in the American political system.[64]

More fundamentally, our findings are consistent with the sense of other observers that there has been a weakening of the American system of incremental, minimalist decision-making (grounded both in the common law and in the Article III prohibition against advisory opinions). With respect to the common law, the holding-dicta distinction simply seems less consequential today than before. In the United States, as Peter Tiersma observed, "the common law is embarking on a path towards becoming increasingly textual. . . [I]t is less and less necessary to search for the holding or ratio decidendi of a case; the judge writing for the majority will often specify exactly what the holding is in carefully crafted text that is meant to fetter the discretion of lower courts in the same way that a statute does."[65] As a result, "legal reasoning is gradually being supplanted by close reading."[66]

In our view, scholars who care about such issues would do well to think about the conditions that limit the consequential use of the holding-dicta distinction. Some of these conditions are tied to the hierarchical relationship between lower and higher courts, including the desire of lower courts to steer clear of direct confrontations with higher courts. Others are tied to the persuasiveness of higher court dicta and the efficiency of looking to cues from higher courts in order to manage a large caseload. Whatever the exact dynamics at play, for the study of dicta to have real world

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[64] Consider, for example, this statement by the Rehnquist Court:

> Our national experience teaches that the Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including stare decisis, and contrary expectations must be disappointed.

City of Boerne v. Flores, 521 U.S. 507, 535-56 (1997).

[65] Perter M. Tiersma, *The Textualization of Precedent,* 82 NOTRE DAME L. REV. 1187, 1188 (2007).

[66] *Id.*

significance, scholars must be cognizant of what courts do and why they do it. This paper is a first step in that enterprise.

APPENDIX[67]

Coding of Citations of Dicta from Higher Courts

Positive Citation
2010 WL 548446
576 F.3d 979
587 F.3d 1133
616 F.3d 963
2008 WL 5110964
546 F.3d 682
538 F.3d 554
409 Fed.Appx. 235
571 F.3d 108
573 F.3d 383
524 F.3d 1350
577 F.3d 672
390 Fed.Appx. 963
404 Fed.Appx. 291
592 F.3d 954
401 Fed.Appx. 877
585 F.Supp.2d 568
2010 WL 2471693
620 F.Supp.2d 857
2009 WL 1796763
667 F.Supp.2d 758
2009 WL 2151197
2008 WL 4372898
2009 WL 995139
2008 WL 5279638
2010 WL 1797412
2009 WL 1905047
2008 WL 4148849
2008 WL 4305921
2008 WL 4133573
595 F.Supp.2d 735

[67] The Appendix can be posted on the law review website or on the website of one of the coauthors. If the journal likes, we can add case names to go with these case citations.

682 F.Supp.2d 49
2008 WL 5169640
555 F.Supp.2d 1013
2009 WL 1287740
544 F.Supp.2d 59
2008 WL 793660
626 F.Supp.2d 469
255 F.R.D. 110
719 F.Supp.2d 7
2010 WL 286641
2010 WL 889292
2009 WL 323219
598 F.Supp.2d 414
2008 WL 360986
2009 WL 2601245
2008 WL 2404967
2008 WL 346007
2008 WL 5378348
209 P.3d 1130
2009 WL 1395825
2008 WL 963860
2009 WL 497735
977 A.2d 228
2009 WL 4682253
2010 WL 1611391
2009 WL 715990
2008 WL 706610
2008 WL 2815534
744 N.W.2d 237
2008 WL 5540475
2010 WL 4025901
2010 WL 2553453
881 N.Y.S.2d 839
2008 WL 1970919
902 N.E.2d 535
939 N.E.2d 525
216 P.3d 902

Dicta Cited In Passing
605 F.3d 985

526 F.3d 1334
591 F.3d 164
621 F.3d 1069
517 F.3d 911
543 F.3d 744
556 F.3d 1300
2008 WL 4442611
2010 WL 1254841
2008 WL 2199689
723 F.Supp.2d 987
746 F.Supp.2d 358
2008 WL 5657801
2008 WL 2915117
686 F.Supp.2d 956
2009 WL 5166258
684 F.Supp.2d 179
2009 WL 2710078
2010 WL 3210765
2010 WL 3521979
2010 WL 4638863
2010 WL 5169074
649 F.Supp.2d 262
659 F.Supp.2d 727
2010 WL 1332715
2008 WL 4347017
2010 WL 3258134
2008 WL 345547
2008 WL 4525422
327 S.W.3d 570
106 Cal.Rptr.3d 342
2010 WL 4132525
2010 WL 1579662
775 N.W.2d 895
2009 WL 1887150
2010 WL 3795192
266 S.W.3d 627
49 Conn. L. Rptr. 244
207 P.3d 631
21 So.3d 987

2009 WL 911296
2008 WL 276406
2009 WL 453917
664 F.Supp.2d 294
2008 WL 4200155
2010 WL 276756
2010 WL 2816374
2008 WL 4198587
2010 WL 1416705
627 F.Supp.2d 1232
669 S.E.2d 25
2010 WL 2053336
2010 WL 2336833

Dicta Deemed Irrelevant By Court
536 F.3d 776
576 F.3d 1
603 F.3d 1127
540 F.3d 231
586 F.3d 1289
595 F.3d 565
534 F.3d 1338
330 Fed.Appx. 16
576 F.3d 84
515 F.3d 272
2010 WL 973375
596 F.Supp.2d 74
2008 WL 2184117
2009 WL 1118782
628 F.Supp.2d 1152
2010 WL 2666950
730 F.Supp.2d 624
2008 WL 2132530
2010 WL 1732551
34 So.3d 183
2010 WL 2135356
997 So.2d 605
2009 WL 3518211